



**Linakala v Khwesa (Environment & Land Case 147 of 2015)  
[2023] KEELC 17280 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17280 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 147 OF 2015**

**DO OHUNGO, J**

**MAY 10, 2023**

**BETWEEN**

**BULINDA LINAKALA ..... PLAINTIFF**

**AND**

**ALEXANDER BULINDA KHWESA ..... DEFENDANT**

**JUDGMENT**

1. Bulinda Linakala (the plaintiff) move the court through plaint dated 11<sup>th</sup> May 2015 wherein he averred that he was the biological father of the defendant and the registered proprietor of land parcel number Kakamega/Shikulu/1923 (the suit property) from 19<sup>th</sup> May 1975 to 12<sup>th</sup> January 2006. That sometime in 2014 he discovered that the defendant caused the suit property to be fraudulently registered in the defendant's name from 12<sup>th</sup> January 2006. The plaintiff therefore sought judgment for cancellation registration of the defendant as the proprietor of the suit property. He further sought costs of the suit.
2. The defendant filed his defence on 13<sup>th</sup> July 2015 and denied the plaintiff's allegations of fraud and averred that the plaintiff offered him the suit property as a gift and participated in the transactions by applying to the relevant Land Control Board and signing the transfer. He added that there existed other suits between the parties over the same issues being Kakamega Chief Magistrate's Court Civil Case No. 345 of 2008 and Kakamega High Court Civil Case No. 11 of 2012. He therefore prayed that this suit be dismissed with costs.
3. The plaintiff testified on 23<sup>rd</sup> October 2018, as PW1. He adopted his witness statement and stated that he was registered as the proprietor of the suit property on 19<sup>th</sup> May 1975 and immediately moved therein with his family. That sometime in 2005, when he was ill, the defendant approached him and convinced him to hand over his national identity card for purposes of demarcating the suit property into several portions for the plaintiff's children. That shortly thereafter, the defendant caused him to thumb print documents necessary to effect the demarcations to enable his children obtain title deeds



for their respective portions and that later, the defendant requested the plaintiff to accompany him to the Ikolomani Land Control Board.

4. The plaintiff further stated that while at the Land Control Board, he learnt that the defendant intended to transfer the entire suit property to the defendant's name after the board inquired from the plaintiff whether he had agreed to transfer the suit property to the defendant. That the plaintiff informed the board that he had only agreed to have the suit property subdivided and be registered in his children's names and that the board assured him that the consent to have the suit property subdivided would be cancelled in view of his sentiments.
5. The plaintiff went on to state that he later physically demarcated the suit property among his sons and daughters in the year 2009 and each of his sons established homesteads on the portions he had parcelled out to them but sometime in 2014 the defendant demolished the houses of two of his brothers which led to the defendant's arrest at the Isulu Police Patrol Base. That following the arrest, the defendant made it known that the suit property was registered in the defendant's name. He added that he never voluntarily transferred the suit property to the defendant and that although he signed the transfer, he thought it was a transfer to all his children.
6. Later, the plaintiff passed away on 28<sup>th</sup> April 2019. Pursuant to an order made on 15<sup>th</sup> February 2021, the plaintiff was substituted with Alfred Manyonyi Bulinda, his other son. The plaint was however not amended.
7. Hearing continued 21<sup>st</sup> February 2022 when Zachaeus Shiberenje Shitendesa testified as PW2. He stated that he is the Chief of Isulu Location and that he personally knew Bulinda Linakala (the deceased plaintiff) who was a resident within PW2's jurisdiction as well as the defendant who is one of the deceased plaintiff's eleven children. He further stated that sometime in 2015, the deceased plaintiff went to his office accompanied by some of his children complaining that the defendant defrauded him of the suit property, that all the parties including the defendant appeared in his office following his summons and that he wrote a letter dated 15<sup>th</sup> November 2016 to the lands department to register a caution.
8. The plaintiff's case was then closed.
9. During defence case, the defendant testified as the sole witness. He stated that the deceased plaintiff was his father and that Alfred Manyonyi Bulinda is his brother. He adopted his witness statement dated 13<sup>th</sup> July 2015 wherein he stated that the deceased plaintiff gifted him the suit property sometime in 2004 and applied to the Ikolomani Land Control Board for consent to transfer it. That he and the deceased plaintiff attended the board on 21<sup>st</sup> October 2004 when the consent was issued. That the deceased plaintiff freely signed the transfer forms thereby transferring the suit property to him and that he never acted fraudulently.
10. The defendant further stated that when the deceased plaintiff gifted him the land, it was the two of them alone without any witnesses and that out of his nine siblings, he got the land exclusively. He also stated that the deceased plaintiff inherited the suit property from the defendant's grandfather. That at the time of gifting him the land, the deceased plaintiff was over 60 years old having retired from employment at a university as a gardener. That the deceased plaintiff could write and read his name.
11. Defence case was then closed. Parties thereafter filed and exchanged written submissions. The plaintiff submitted that the defendant took advantage of the deceased plaintiff's illiteracy and registered the entire suit property in his name. That the suit property being ancestral land, the deceased plaintiff could not have transferred it without the involvement of his children. Consequently, the plaintiff argued that he had established his case and urged the court to grant the orders.



12. The defendant submitted that during cross examination, the deceased plaintiff admitted that he made an application to the Land Control Board and signed the transfer forms. That the deceased plaintiff knew the land was being transferred to the defendant and was aware of what he was doing. That the plaintiff cannot now claim that the suit property was ancestral land. The defendant therefore argued that his rights as a registered proprietor are protected by law. He urged the court to dismiss the plaintiff's case.
13. I have carefully considered the parties' pleadings, evidence, and submissions. The issues for determination are whether fraud has been established and whether the reliefs sought should issue.
14. There is no dispute that the defendant is the registered proprietor of the suit property. He became registered proprietor on 12<sup>th</sup> January 2006 and a title deed was issued to him on 31<sup>st</sup> January 2006. It is also not in dispute that the deceased plaintiff who was the defendant's father, was the registered proprietor of the suit property from 19<sup>th</sup> May 1975 to 12<sup>th</sup> January 2006. Equally, it is not disputed that the deceased plaintiff had about nine other children besides the defendant.
15. As a registered proprietor of land, the defendant is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the *Act* obligates the court to accept the defendant's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The said sections provide as follows:
  24. Interest conferred by registration  
Subject to this Act—
    - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ....
  26. Certificate of title to be held as conclusive evidence of proprietorship
    - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
      - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
      - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...
16. In view of these provisions, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
17. The plaintiff has attacked the defendant's title on allegations of fraud. In those circumstances, the plaintiff is duty bound to prove fraud but to additionally show that the defendant was party to such fraud. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but



lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR.

18. The circumstances of this case are rather unique. The dispute is between father and son, over ancestral property which the defendant's siblings would have been ordinarily entitled to by way of inheritance. The deceased plaintiff testified that while it is true that he affixed his thumb print on the application for consent and even the transfer form, his intention was to subdivide and transfer the suit property to his children including the defendant but not to the defendant exclusively.
19. Among the particulars of fraud that the deceased plaintiff pleaded was that the defendant took advantage of his illiteracy. While the defendant testified that the deceased plaintiff could read and write and knew what he was doing, I note that the documents that the defendant produced in support of his acquisition include a transfer for and an application for consent of the land control board, both of which bear thumb prints on the space meant for the transferor's signature. The defendant did not explain why the deceased plaintiff affixed his thumb print if he could read and write.
20. The deceased plaintiff testified that there were disputes over the defendant's ownership of the suit property which led to the defendant being arrested, summoned to the chief's office and the chief writing a letter dated 15<sup>th</sup> November 2014. Based on the letter, a restriction was registered against the suit property on 28<sup>th</sup> November 2014. Further, the defendant himself conceded that the disputes led to filing of other cases against him from as far back as 2008. Those circumstances do not at all support the gifting theory.
21. There is no reasonable explanation as to why the deceased plaintiff would have gifted the suit property to the defendant to the exclusion of the defendant's several siblings. I also note that the defendant testified that the alleged gifting of ancestral land was done privately to him without any witness. That is quite unusual in such a large family.
22. The defendant testified that he processed the transfer to himself by appearing before the land control board and obtaining consent. I am persuaded that the plaintiff has established fraud and that the defendant as the registered proprietor perpetrated the fraud by taking advantage of the deceased plaintiff's illiteracy and even trust. Consequently, the plaintiff has made a case for the relief of cancellation sought.
23. In view of the foregoing, I make the following orders:
  - a. The registration of the defendant as the proprietor of Title Number Kakamega/Shikulu/1923 is hereby cancelled.
  - b. In view of the relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF MAY 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Ms Sitati holding brief for Ms Mukhwana for the plaintiff

The defendant in person

Court Assistant: E. Juma

